



October 12, 2001

Mr. Gary L. Warren, Sr.  
Executive Director  
Texas Commission on Fire Protection  
P.O. Box 2286  
Austin, Texas 78768-2286

OR2001-4620

Dear Mr. Warren:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 153250.

The Texas Commission on Fire Protection (the "commission") received a request for copies of documents collected by the commission pertaining to a specified investigation. You state that you will release some responsive information to the requestor. You claim, however, that the submitted information is excepted from disclosure pursuant to sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that section 552.022 of the Government Code makes certain information public, unless it is expressly confidential under other law. One category of public information under section 552.022 is a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by section 552.108 of the Government Code. *See* Gov't Code § 552.022(a)(1). You state that the submitted information constitutes records from a completed investigation. You claim that these records are excepted from disclosure pursuant to section 552.103 of the Government Code. However, section 552.103 is a discretionary exception under the Public Information Act (the "Act") and does not constitute "other law" for purposes of section 552.022(a).<sup>1</sup> Therefore, we do not address your section 552.103 claim with regard to the submitted records.

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<sup>1</sup> Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

You also claim that portions of the submitted records are protected from disclosure under the informer's privilege. The common law informer's privilege, incorporated into the Act by section 552.101 of the Government Code,<sup>2</sup> has long been recognized by Texas courts. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); see also *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928); *Roviaro v. United States*, 353 U.S. 53, 59 (1957). The informer's privilege under *Roviaro* exists to protect a governmental body's interest. Thus, it may be waived by a governmental body and is also not "other law" that makes information confidential under section 552.022. See Open Records Decision No. 549 at 6 (1990). Accordingly, we do not address your common law informer's privilege claim with regard to the submitted information.

However, the Texas Supreme Court recently held in *In re The City of Georgetown*, 2001 WL 123933, at \*8 (Tex. Feb. 15, 2001) (No. 00-0453) that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." Accordingly, we address whether any portion of the submitted information is protected from disclosure under Rule 508 of the Texas Rules of Evidence. Rule 508 provides in pertinent part:

(a) Rule of Privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who May Claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished, except the privilege shall not be allowed in criminal cases if the state objects.

Tex. R. Evid. 508. Although you state that the investigation found evidence of violations of the Commission's rules, you do not specifically indicate that the release of any portion of the submitted information would "disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer." Consequently, we conclude that the commission may not withhold any portion of the submitted information from disclosure pursuant to Rule 508 of the Texas Rules of Evidence. Accordingly, the commission must release all of the submitted information to the requestor.

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<sup>2</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

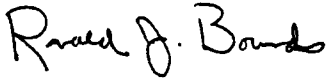
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Ronald J. Bounds".

Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/seg

Ref: ID# 153250

Enc. Submitted documents

cc: Mr. Harvie E. Cheshire  
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(w/o enclosures)